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SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1970

No. .....

NOY HAYNES,

Petitioner,

v.

JAMES H. CARR, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, rendered in this case May 26, 1970.

OPINIONS BELOW

The opinion of the District Court is reported in 307 F. Supp. 1228. The opinion of the Court of Appeals is reported in ..... F.2d ..... These opinions appear as Appendices B and C of this petition (pp. 20-39 *infra*).

JURISDICTION

The judgment of the Court of Appeals was rendered May 26, 1970. Petitioner's timely petition for rehearing,

filed June 11, 1970, was denied June 23, 1970 (Appendices D and E, pp. 40-41 *infra*). Jurisdiction is based on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

When a workman employed on a construction project by the general contractor is injured due to negligence or breach of warranty in the providing of a defective structural part by a sub-contractor, the workman receives compensation under a Workmen's Compensation Act from his actual employer, and the sub-contractor neither contributes to payment of such compensation nor is subject to contingent liability for such compensation under the Act, does an application of the Act so as to render the sub-contractor immune from a common law suit for the workman's injury deprive the workman of property without due process of law in violation of the 5th or 14th Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V: "No person shall . . . be deprived of . . . property, without due process of law . . ."

United States Constitution, Amendment XIV, § 1: ". . . nor shall any state deprive any person of . . . property, without due process of law . . ."

The constitutional question involved is presented by the application to the facts of this case of several provisions of the Virginia Workmen's Compensation Act, set out in Appendix A, pp. 15-19 *infra*: §§ 65.1-5, 65.1-29, 65.1-30, 65.1-31, 65.1-32, 65.1-40, 65.1-41, 65.1-103, 65.1-54, and 65.1-56, all found in Volume 9, Code of Virginia (1950), 1968 Replacement Volume, pp. 393-463, and in the 1970 Cumulative Supplement thereto, p. 103, and the former § 65-51,

found in Virginia Acts of General Assembly, 1964 Session, p. 125.

STATEMENT OF THE CASE

Petitioner Noy Haynes, a carpenter employed by Earl M. Childrey, Inc., a general contractor constructing a church, suffered severe and permanent injuries October 25, 1965, when a large truss supplied to Childrey by its sub-contractor,[1] respondent James H. Carr, Inc., collapsed.

As the courts below pointed out, compensation under the Workmen's Compensation Act was paid by Childrey, petitioner's actual employer, and nothing was paid by respondent (pp. 27, 32 *infra*).

Petitioner filed a common law suit, based on diversity of citizenship and amount, against respondent and another,[2] demanding $250,000 in damages for his injury, charging negligence and breach of warranty. Respondent's motion to dismiss was granted because the Virginia Workmen's Compensation Act was construed to bar petitioner's common law suit against respondent, "an independent contractor engaged in performing services which were a part of Childrey's business and occupation" (p. 31 *infra*). The Court of Appeals affirmed on the same ground (p. 29 *infra*). In both the District Court and the Court of Appeals, petitioner argued unsuccessfully that this application of the Act deprived him of property without due process of law.

[1] For the purpose of this petition, petitioner accepts the characterization of respondent by the courts below as a subcontractor, a finding essential to the conferring of tort immunity upon respondent as a matter of state law. Had the court below characterized respondent instead as a mere supplier of materials, as petitioner urged, the opposite result would have obtained and petitioner would have his common law action against respondent. *Burroughs* v. *Walbuont*, 210 Va. 98, 99, 168 S.E.2d 107, 108 (1969), cited by the court below at p. 31 *infra*.

[2] Respondent's co-defendant below was dismissed for insufficient service of process, and is now out of the case.

The Virginia Workmen's Compensation Act is typical in allowing a workman recovery from his employer on proof only of injury arising out of and in the course of his employment, free of the need to prove negligence and of the common law fellow servant, contributory negligence and assumption of risk defenses. In return, his employer's liability is limited to medical expenses plus, as "compensation," a percentage of normal wages for a limited period of time. Under the scale in effect at the time of petitioner's injury, maximum compensation for permanent total disability was $39 a week for 500 weeks, not exceeding a total of $15,600 (§ 65-51, pp. 18-19 *infra*).[3] Of course, because of such "fixed dollar ceilings on benefits, compensation awards are generally inadequate, both in relation to meeting the needs of the victims of industrial injury under current cost of living levels, and conspicuously in relation to standards that have grown up of what constitutes adequate damages in a personal injury action." 2 Larson, *The Law of Workmen's Compensation*, § 72.50, pp. 226.2-226.3

Virginia, like most states,[4] supplements the liability of actual employers for compensation to their workmen under the Act by a "statutory employer" scheme under which a general contractor must pay such compensation to an injured employee of a sub-contractor if the latter does not pay; a subcontractor must pay the injured employee of a

[3] File 819-830 of the Industrial Commission of Virginia shows petitioner to date has received $9,052.12 in compensation, based on a prior period of temporary *total* disability and a preliminary evaluation of *permanent* loss of 75% of the use of one leg, which resulted in an award of $39 for 131.25 weeks under the *partial* disability percentage scale set up in § 65.1-56(15) (p. 19 *infra*). A recent re-evaluation, increasing this permanent disability to 85%, not yet acted on, will probably provide another 17.5 weeks of compensation at $39 a week, giving petitioner a final total compensation under the Act of $9,734.67, less the fee of his attorney before the Commission.

[4] See 2 Larson, § 72.31, quoted at pp. 6-7 *infra*.

sub-sub-contractor if the latter does not pay, and the owner of a building under construction by a general contractor must pay statutory compensation to an employee of the general contractor, sub-contractor, or sub-sub-contractor, if he does not pay. (§ 65.1-29, § 65.1-30, § 65.1-31, pp. 15-16 *infra*).

Virginia, again like most states,[1] does not impose such contingent liability in the reverse situation; a *sub*-contractor is *not* contingently liable under the Act to pay statutory compensation to a workman employed by the *general* contractor. Thus in this case respondent, as a sub-contractor, not only did not pay, but never could be compelled to pay, statutory compensation to petitioner.

On its face the Virginia Act is confusing and contradictory because of patchwork amendment over the years.

In one breath it purports to say that compensation under the Act "shall exclude *all* other rights and remedies of such employee . . . at common law or otherwise . . ." (§ 65.1-40); in another it says when an employer is properly insured under the Act only "he *or those conducting his business* shall be only liable to an employee for personal injury . . . to the extent . . ." specified in the Act (§ 65.1-103); in another it says nothing in the Act "shall be construed to make, for the purposes of this act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor" (§ 65.1-5); in another it subrogates an employer paying compensation under the Act to the rights the workman "may have *against any other party* for such injury . . ." (§ 65.1-41) (pp. 15, 17, 18 *infra*. Italics added.)

As pointed out by the court below (p. 34 *infra*), the Virginia court has construed these sections to mean a defendant is an "other party" within the meaning of § 65.1-

41, and thus amenable to common law suit if, and only if, the defendant is not at the time of the accident performing work that was part of "the trade, business or occupation" of the plaintiff's actual employer.

No opinion of the Virginia court addresses the due process question presented here.

SUMMARY OF ARGUMENT

A provision in a Workmen's Compensation Act which bars a workman's common law action for injuries against his *actual* employer, or a "*statutory*" employer actually paying benefits under the Act, is constitutional. An interpretation of the Act which similarly bars such an action against a party who has actually paid the workman no compensation under the Act, but has a contingent liability as a "statutory" employer, is arguably constitutional. An interpretation of the Act which bars such an action against a party who has neither paid, nor is contingently liable to pay, compensation under the Act, deprives the injured workman of property without due process of law.

REASONS FOR ALLOWANCE OF THE WRIT

The problem presented in this petition is not peculiar to Virginia. See 58 Am. Jur. *Workmen's Compensation*, § 60, pp. 616-17; 101 C.J.S. *Workmen's Compensation*, § 985, pp. 466-83.

The leading authority on the subject says 44 states have "statutory employer" statutes under which a *general* contractor may be held liable for compensation under the compensation act for injuries to an employee of a *sub*-contractor, and there is a "marked trend" toward granting such a general contractor immunity from tort suit even when payment under the Act is actually made by the sub-contractor. 2

Larson, *The Law of Workmen's Compensation*, § 72.31, pp. 189-94. In the reverse situation where, as here, an employee of a *general* contractor sues a *sub*-contractor, "the *great majority* of jurisdictions have held that the sub-contractor is a third party *amenable to suit*," since "the general contractor has a statutory liability to the sub-contractor's employee, actual or potential, while the sub-contractor has *no comparable statutory liability to the general contractor's employee*." Although this distinction is "self-evident," the author cites "bizarre" contrary decisions in Massachusetts and Florida similar to the decision in this case, and "other states from time to time are being asked to start down this road." *Id.*, § 72.32, p. 203; § 72.33, p. 206. (Italics added).

We respectfully submit that "this road" to unpaid-for immunity should end with this case, because of the manifest injustice of a rule which "gives a windfall to tort-feasors." *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75 (1968), particularly when, as here, the life or death of a valuable property right depends on an intricate factual distinction between a sub-contractor and a materialman (pp. 32-34 *infra*; footnote 1, p. 3 *supra*).

Of course a tort cause of action is "property" within the meaning of the Constitution. *Terracciona* v. *Magee*, 53 N.J. Super. 557, 148 A.2d 68, 75-76, (1959); *Martinez* v. *Fox Valley Bus Line*, 17 F. Supp. 576, 577 (N.D. Ill. 1936).

The court below dismissed the due process question with a single line, saying petitioner's "argument that the Virginia Workmen's Compensation Act is unconstitutional is foreclosed by *Northern P. Ry.* v. *Meese*, 239 U.S. 614, 620 (1916)." (p. 35 *infra*).

Meese, decided during the infancy of American workmen's compensation law, did *not* involve due process. There

the Court held only that a construction of the Washington Workmen's Compensation Act making acceptance of compensation under the Act a bar to a common law action against a third-party tort-feasor did not "conflict with the *equal protection clause* of the Fourteenth Amendment," the Court stating that the claimants there "have raised *no other question* involving application of the Federal Constitution." 239 U.S. at 620. (Italics added.)

A problem similar to that raised in *Meese* was litigated 36 years later in *Grasse* v. *Dealer's Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952), cert. den. 344 U.S. 837 (1952), involving a section of the Illinois Workmen's Compensation Act which permitted a compensated employee to bring a common law action against a third-party tort-feasor if the latter was *not bound* by the Act, but *not* if he *was* bound. The court found that this distinction deprived the plaintiff not only of equal protection of the laws but also of property without due process of law, in violation of both state and federal constitutions. 412 Ill. at 200, 106 N.E.2d at 135.

The Illinois court rejected the argument that the invalidated section "was the '*quid pro quo*' for the imposition of liability without fault upon employers, as defendant suggests. The alleged '*quid pro quo*' for imposing liability without fault upon employers to their employees is the scheduled and limited *payments the employers are required to pay their employees*, and not the additional bonus of limiting both the employer's and employee's common-law liability to third persons." 412 Ill. at 203, 106 N.E.2d at 136-37.

Among the cases cited by the Illinois court in *Grasse* was *N.Y. Central Railroad* v. *White*, 243 U.S. 188 (1917), decided a year after *Meese*. It was an appeal by the employer from a death award under the New York Workmen's Compensation Act in which it was contended, among other

things, that provisions of the Act deprived the employer of property without due process of law, the employer further arguing that the *employee's* rights were interfered with "in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act." 243 U.S. at 196.

The Court said it was not necessary, "for the purposes of the present case, to say that a state might, without violence to the constitutional guarantee of '*due process of law,*' suddenly set aside *all* common-law rules respecting liability as between employer and employee, *without providing a reasonably just substitute* . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up *something adequate in their stead.* No such question is here presented, and *we intimate no opinion upon it.*" 243 U.S. at 201.

"It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards . . . , to require him to contribute a reasonable amount . . . by way of compensation . . . irrespective of the question of negligence . . . ." 243 U.S. at 203-4 (Italics added.)

"This, of course, *is not to say that any scale of compensation, however insignificant,* on the one hand, or onerous, on the other, *would be supportable.* In this case, no criticism is made on the ground that the compensation prescribed by the statute . . . is unreasonable in amount . . . *Any question of that kind may be met when it arises.*" 243 U.S. at 205-6. (Italics added.)

On the same day, in *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917), affirming a judgment against an employer in a suit to recover workmen's compensation premiums, the Court sustained the Washington Act against due process attack. The court first pointed out:

> "While plaintiff in error is an employer and cannot succeed without showing that its constitutional rights as employer are infringed . . . , yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme *and the quid pro quo for the burdens imposed upon him*, so that if the act is not valid as against employees, it is not valid as against employers." 243 U.S. at 234. (Italics added.)

Answering the complaint that charges under the Act were so unreasonable in amount as to deny due process, the Court repeated what it said in the *White* case: ". . . we do not intend to say that any scale of compensation, however insignificant on the one hand, or onerous on the other, would be supportable and any question of that kind may be met when it arises." 243 U.S. at 241.

Thus it can be seen that in the landmark decisions sustaining against due process attack the interference which workmen's compensation acts impose upon traditional common law tort claims and defenses, the Court has found due process satisfied *only by the exaction of a quid pro quo*. Thus, here petitioner's actual employer, Childrey, is immune from whatever common law rights plaintiff might otherwise have against him because he has paid something in return—absolute liability, though on a limited scale of damages, under the Act. Were Childrey uninsured and insolvent, the burden would fall on the owner (§ 65.1-29, p. 15 *infra*). A similar contingent liability, as a *quid pro quo* might excuse as not violative of due process the immunity

from suit hereinr granted to respondent Carr. Such contingent liability being lacking (pp. 4-5 *supra*), there is *no quid pro quo*, and thus the immunity of respondent provided by the Act as applied below deprives petitioner of his property without due process. See the statements in the *White* and *Mountain Timber* cases that a scale of compensation too "insignificant" might not be supportable against due process attack. Here the compensation available from respondent is nil.

Nor should we lose sight of the fact that the application of the Act below deprives *another* innocent party of property without due process—employer Childrey, whose statutory subrogation right against a third-party tort-feasor (§ 65.1-41, p. 17 *infra*) is similarly abolished by the judgment below.

Virginia did not always interpret its act as complained of here. First a perhaps constitutionally permissible immunity was granted when a plaintiff sought to sue a contractor *above* his actual employer in the hierarchy of employment, who was thus contingently liable to pay plaintiff compensation under the Act, like the general contractor granted immunity from suit for the death of a sub-contractor's employee in *Sykes* v. *Stone & Webster Engineering Corp.*, 186 Va. 116, 122, 41 S.E.2d 469, 472 (1947), where the court said:

> "It clearly appears to be the purpose of § 20(a) [now §§ 65.1-29 to 65.1-32, pp. 15-17 *infra*] to bring within the operation of the Compensation Act all persons engaged in any work that is part of the trade, business or occupation of the original party who undertakes as owner, or contracts as contractor, to perform that work, and to make liable [under the Act] to every employee engaged in that work every such owner, or contractor, and sub-contractor, *above such employee*. . . ."

That some sort of *quid pro quo* moving from the negligent defendant to another employer's injured servant is necessary to sustain defendant's immunity from common law suit, suggested in *Sykes*, was further enunciated in *Kramer* v. *Kramer*, 199 Va. 409, 418, 100 S.E.2d 37, 44 (1957), where the court said: "If the employee of one independent contractor cannot sue *another* independent contractor at common law, it must be because *under the compensation law* the plaintiff is the [statutory] employee of the defendant . . ." (Italics added.)

Meanwhile, however, this principle was lost sight of, and immunity extended to a defendant in the same "trade, occupation or business" as the plaintiff's employer, even though the defendant gave no *quid pro quo* of actual or contingent liability under the Act, in *Doane* v. *DuPont*, 209 F.2d 921 (4th Cir. [Va.] 1954), where "for the first time the Virginia Workmen's Compensation Act was construed to deprive an injured employee of his common law right to recover for injuries tortiously inflicted upon him by servants of an independent contractor even though the Workmen's Compensation Act admittedly gave him no right to statutory compensation from such contractor." Smithers, *Third Party Actions Under Workmen's Compensation Act*, 1 U. of Richmond Law Notes 299, 305 (1962). The Virginia court then followed this lead in such cases as *Rea* v. *Ford*, 198 Va. 712, 96 S.E.2d 92 (1957); *Anderson* v. *Thorington Construction Co.*, 201 Va. 266, 110 S.E.2d 396 (1959);[5] *Williams* v. *Gresham Co.*, 201 Va. 457, 111 S.E. 498 (1959);

[5] Plaintiff in *Anderson* sought to have this Court review his case on constitutional grounds, but his appeal was dismissed, apparently because the federal question was first raised in a petition for rehearing filed in the State Supreme Court after it rendered its opinion, this Court saying dismissal was "for want of a *properly presented* substantial federal question." 363 U.S. 719 (1960) (Italics added.) Here the federal question was raised at every stage (p. 3 *supra*).

and *Floyd* v. *Mitchell*, 203 Va. 269, 123 S.E.2d 369 (1962), which are among the decisions relied on in this case by the courts below (pp. 28-31, 33-34 *infra*).[6] In none of these opinions was the due process question urged here mentioned.

Considering the problem, in the words of the *White* opinion, "on the grounds of natural justice" (243 U.S. at 201), these comments by Professor Larson may put the question posed in proper perspective:

> "The concept underlying third party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer . . . [E]very mature loss-adjusting mechanism must look in two directions: it must make the injured person whole, and it must also seek out the true wrongdoer whenever possible . . . So, it is elementary that if a stranger's negligence was the cause of injury to claimant in the course of employment, the stranger should not be in any degree absolved of his normal obligation to pay damages for such an injury." 2 Larson, *The Law of Workmen's Compensation*, § 71.10, pp. 165-66.
>
> "If there is no strong reason of compensation policy for destroying common-law rights as to various classes of third parties, then, *every presumption should be on the side of preserving those rights*, once basic compensation protection has been assured. The fundamental reasons for negligence liability are the same as they always were. The injured plaintiff has a right to be made whole—*not just partly whole*—and the more inadequate compensation recoveries appear, the more cogent becomes this argument. Moreover, all the reasons for making the wrongdoer bear the cost of his wrongdoing still apply, including the moral rightness of this result as well as the salutary effect it tends to have as an

[6] Efforts to have this rule of immunity changed legislatively have run afoul of the powerful insurance and manufacturers' lobbies. Smithers, *supra*, describes the 1960 attempt; 1 U. of Richmond Law Notes at 312. A similar effort in 1970 died in committee.

incentive to careful conduct and safe work practices." *Id.*, § 72.50, p. 226.3.

CONCLUSION

In conclusion, let us emphasize that recovery from James H. Carr, Inc., would do justice to all parties. Petitioner would be made whole; Carr, whose negligence caused the injury, would pay the damages; and, the employer of Haynes who was without fault, would recover from Carr by way of subrogation what the employer was compelled to pay Haynes under the Workmen's Compensation Act for Carr's negligence.

Certiorari should be granted to determine whether petitioner may have his day in court.

Respectfully submitted,

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September 4, 1970

CERTIFICATE OF SERVICE

Three copies of this petition were mailed, postage prepaid, to Henry H. McVey, III, Esquire, 1400 Ross Building, Richmond, Virginia 23219, counsel for respondent, on or before September 3, 1970.

GEORGE E. ALLEN
Of Counsel for Petitioner

APPENDIX

APPENDIX A

EXCERPTS FROM THE WORKMEN'S COMPENSATION ACT OF VIRGINIA

(Note: This Act, which formerly comprised Title 65 of the Code of Virginia (1950), was recodified by the 1968 act which repealed Title 65 and enacted in its stead Title 65.1. The section numbers below are those of the recodified Act, referred to in the decision of the Court of Appeals. In parentheses following each section is the corresponding section number of the former Title 65, referred to in the District Court opinion, which was in effect when petitioner was injured. (See footnote 1, p. 27 *infra*.) The 1968 recodification made no change, other than numbering, in any of the sections set out below except § 65-51, in effect when petitioner was injured, which states the amount of compensation then payable, increased by the new § 65.1-54.)

§ 65.1-5. *Employees of independent contractors.*—Nothing in this act contained shall be construed to make, for the purposes of this act, the employees of an independent contractor the employees of the person or corporation employing or contracting with such independent contractor. (Michie Code 1942, § 1887(12); 1950 Code § 65-5.)

§ 65.1-29. *Liability of owner to workmen of subcontractors.*—When any person (in this section and §§ 65.1-31 and 65.1-32 referred to as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 65.1-31 to 65.1-34 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this act which he would have been liable to pay if the work-

man had been immediately employed by him. (1918, p. 641; 1924, p. 479; Michie Code 1942, § 1887(20); 1950 Code § 65-26; 1968, p. 1128)

§ 65.1-30. *Liability of contractor to workmen of subcontractor.*—When any person (in this and the four succeeding sections referred to as "contractor") contracts to perform or execute any job for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 65.1-31, 65.1-32, 65.1-33 and 65.1-34 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him. (1918, p. 641; 1924, p. 480; Michie Code 1942, § 1887(20); 1950 Code § 65-27)

* * *

§ 65.1-31. *Liability of subcontractor to workmen of sub-subcontractor.*—When the subcontractor in turn contracts with still another person (in this section and §§ 65.1-32, 65.1-33 and 65.1-34 also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or subcontractor shall be the same as the liability imposed by the two preceding sections. (Michie Code 1942, § 1887(20); 1950 Code § 65-28)

§ 65.1-32. *Construction of Act when proceedings are against owner or contractor.*—When compensation is claimed from or proceedings are taken against the owner

or contractor, then in the application of this act reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed. (§ 65-29)

§ 65.1-40. *Employee's rights under Act exclude all others.*—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death. (§ 65-37)

§ 65.1-41. *Subrogation of employer to employee's rights against third parties; evidence; recovery; compromise.*—The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the

employer for the benefit of the injured employee or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in § 65.1-43. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Industrial Commission and the injured employee or the personal representative or dependents of the deceased employee being first had and obtained. (1920, p. 256; 1924, p. 479; 1930, p. 406; 1932, p. 486; 1936, p. 591; Michie Code 1942, § 1887(12); 1950 Code § 65-38)

§ 65.1-103. *Duty to insure payment of compensation; effect of insurance.*—Every employer subject to the compensation provisions of this act shall insure the payment of compensation to his employees in the manner hereinafter provided. While such insurance remains in force he or those conducting his business shall only be liable to an employee for personal injury or death by accident to the extent and in the manner herein described. (§ 65.99)

§ 65.1-54. *Compensation for total incapacity.*—When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to sixty per centum of his average weekly wages, but not more than sixty-two dollars nor less than fourteen dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed twenty thousand eight hundred dollars. (§ 65-51)

§ 65-51. When the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid,

as hereinafter provided, to the injured employee during such total incapacity, a weekly compensation equal to sixty per centum of his average weekly wages, but not more than thirty-nine dollars, nor less than fourteen dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed fifteen thousand six hundred dollars.

§ 65.1-56. *Cases in which incapacity shall be deemed to continue for periods specified in section; compensation.*—In cases included by the following schedule the incapacity in each case shall be deemed to continue for the period specified and the compensation so paid for such injury shall be as specified therein and shall be in lieu of all other compensation:

. . . (15) For the loss of a leg sixty per centum of average weekly wages during one hundred and seventy-five weeks.

. . . In construing this section the permanent loss of the use of a member shall be held equivalent to the loss of such member and for the permanent partial loss or loss of use of a member compensation may be proportionately awarded.

The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maxima and minima as set out in § 65.1-54. (§ 65-53)

APPENDIX B

MEMORANDUM OPINION OF THE DISTRICT COURT

Civil Action No. 5114

Noy Haynes (Haynes) filed his complaint against James H. Carr, Inc. (Carr) and Pacific Lumber Inspection Bureau (Pacific) to recover damages for injuries sustained when wooden trusses used in the construction of a church in Chesterfield County, Virginia, collapsed. Each defendant filed a motion to dismiss. Interrogatories were filed and answered, depositions taken, and oral evidence offered on the motions. From these, the hereinafter stated facts are established.

Plans for the construction of the church were prepared by Charles Shiflett and Thomas A. Gresham Associated Architects (Architects), who were assisted by Torrence, Dreelin, Farthing and Buford, Consulting Engineers (Engineers), in designing the structural portion of the building which included the wooden trusses. Plans and specifications for the trusses were prepared by Engineers and incorporated in the plans by Architects. The construction was let to bids. The general contractors sought and obtained bids from various sub-contractors for certain specified portions of the general contract. Earl M. Childrey, Inc. (Childrey) a general contractor, became the successful bidder, for a "turn-key" job. Carr was a sub-contractor. Carr had previously submitted a bid to Childrey for the truss work, which was incorporated into the bid submitted by Childrey for the job. When Childrey was awarded the contract, he sub-contracted with Carr for the truss work. After Carr was awarded the sub-contract for the truss work, Carr made shop drawings from the plans and specifications of the Architects and submitted the shop drawings for approval to Childrey who passed them along to the Architects and Engineers. The sub-contract of Carr provided he would assemble them at

the job-site. The timbers were pre-cut, the holes drilled, etc., and the timbers, bolts, rings, etc., delivered to the job-site. Carr's employees then went to the job-site, assembled the trusses and stacked them on the job, at the location designated by Childrey. Thereafter, while Childrey was erecting the trusses, some of them fell and/or collapsed, injuring plaintiff.

The record does not disclose where or from whom Carr purchased the timbers used in the construction of the trusses. Following the collapse of the trusses, an investigation disclosed that timbers used in the construction of the trusses had been graded and inspected by PLIB. PLIB is chartered in the State of Washington, with its principal office in Seattle, and with branch offices in Oregon, California, British Columbia and Canada. In addition, it operated in Alaska. It is a non-profit service organization. It is a "grading agency for grading lumber for anyone that is dealing in lumber products" that cares to have its grade stamp or certification. Its operation areas are Washington, Oregon, California, British Columbia, Canada and Alaska. All of its inspectors reside within the above area. It has no agents or officers in any other areas. It has no officers, agents or employees in Virginia, nor has it graded lumber in Virginia. It does not sell or ship lumber or other goods or merchandise, nor does it have any control or interest in where lumber graded by it is sold or used. It did not and does not deal with Carr. All its revenues arise from inspection charges. The charge is based upon the inspector's wages plus an overhead fee for carrying on the organization, termed as a per diem fee. It derives no revenues from any services performed in Virginia. It does no advertising and has sent no materials to Virginia. It has no contract to supply or furnish its services or anything else in Virginia, nor has it engaged in any course of conduct nor derived "substantial revenues" for services per-

formed in Virginia. It appears the only time it had an employee in Virginia was when, following the collapse of the trusses, it had an employee come to Virginia and make an investigation of the material used in the trusses. This investigation established that some of the timbers bore the inspection stamp of PLIB.

Plaintiff's action is based upon a breach of express and implied warranty of the quality of the materials used in the trusses, and negligence in the inspection, grading and marking of the lumber, and fabrication of the trusses.

The motions filed by the defendants deal with separate legal issues and will be dealt with separately.

Motion of PLIB

PLIB is alleged to be a non-resident of Virginia, and it is. Process for it was served on the Secretary of the Commonwealth of Virginia, pursuant to the provisions of the Long Arm Statute. This defendant moves to dismiss the action or quash the return of service of summons.

The burden of pleading and when challenged of supporting jurisdictional facts by competent and preponderant proof is upon the plaintiff. *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 182, 189; *Kvos, Inc.* v. *Associated Press*, 299 U.S. 269, 278; *Boxeman* v. *White*, 388 F.2d 756, 760 (4th Cir. 1968); *Hedberg* v. *St. Farm Mutual*, 350 F.2d 924, 929 (8th Cir. 1965). The complaint must state on its face the grounds for the Court's jurisdiction. Federal Rules of Civil Procedure, Rule 8(a)(2). *Boxeman* v. *White*, *supra*, *Gold-Washing and Water Co.* v. *Keyes*, 96 U.S. 199; *Ivey* v. *Frost*, 346 F.2d 115, (8th Cir. 1965).

To exercise jurisdiction over PLIB, an out-of-state-defendant, on the facts of this case, plaintiff must point to some United States statute, Virginia statute or rule of court

authorizing such assertion of jurisdiction. There is no such United States statute. Hence, we turn to the Long Arm Statute of Virginia, Title 8, Chapter 4.1 of the Code of Virginia 1950, as amended in 1964, the pertinent section being 8-81.2. That Chapter provides that whenever "person" is used in the Chapter, it shall include "corporation, etc." The pertinent parts of the Chapter are:

> § 8-81.2. When personal jurisdiction over person may be exercised.
>
> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) Transacting any business in this State;
>
> (2) Contracting to supply services or things in this State;
>
> (3) Causing tortious injury by an act or omission in this State;
>
> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;
>
> (5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods

used or consumed or services rendered in this State;
* * *

Sub-paragraphs (a) (6) and (7) of said section deal with real property in this State, and contracts of insurance. Sub-paragraph (b) provides that whenever "jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted." Such is the case here.

Applying the facts as determined from the record, it is clear PLIB transacts no business in Virginia. It has no office here, is not licensed to do business here, and has no employees, agents or officers here. It has not entered into any contract to do business, sell or furnish materials, services or things in Virginia. It has shipped no goods, merchandise or things to Virginia. It has no customers or contacts in Virginia. It does not manufacture, fabricate, buy, sell or otherwise deal in any merchandise. Haynes contends that when a representative of PLIB came into Virginia to inspect the lumber which had been used to construct the trusses, this single act brought PLIB within the provisions of the statute of transacting business in the State. It is difficult to believe that the courts could hold such a single act as constituting transacting business. It appears to be only an incidental activity. *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956); *Beaty* v. *M. S. Steel Co., Inc.*, 401 F.2d 157 (4th Cir. 1968).

The cause of action did not arise from sending the person to Virginia to make an inspection of the lumber. The accident had already occurred. Here there was no acting "as to a cause of action arising from the person's transacting any business in this State." Code of Virginia, 8-81.2.

PLIB's operations are conducted on the West Coast. It has made no contact in Virginia or elsewhere to be per-

formed in Virginia, nor has it contracted to perform services in Virginia. It has made no contract to supply services or things in Virginia. The evidence does not bring this case within the provisions of Section 8-81.2(a)(2).

Under 8-81.2(a)(3), jurisdiction can only be obtained over one "causing tortious injury by an act or omission in this State." Applying the evidence before the Court, which is set out above, the causing of tortious injury "by an act or omission in this State" is not shown. If an act or omission occurred, it was at the inspection. The evidence does not even suggest that occurred in Virginia.

Subparagraph (a)(4) [8-81.2(a)(4)] provides for jurisdiction as to a cause of action arising from the person's "causing tortious injury in this State" by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenues from goods used or consumed or services rendered, in this State. The occurrence of the injury in Virginia, and the occurrence of the act or omission out of Virginia does not complete the jurisdictional requirement. The person over whom jurisdiction is sought must be one who *regularly does or solicits business*, or engages in some other *persistent course of conduct*, or derives substantial revenues from *goods used or consumed* or *services rendered, in this State*. It means substantial. *Erlanger Mills* v. *Cohoes Fibre Mills, supra*. As pointed out above, PLIB does not solicit any business in Virginia, it renders no services in Virginia, it engages in no persistent course of conduct in Virginia. There is no evidence it derives substantial revenues from goods used or consumed in Virginia. It would be pure speculation to say that it does.

Lastly, sub-section (a)(5) [8-81.2(a)(5)] provides for service on one "causing injury in this State to any person

by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State." To come within the provisions of this sub-section there must be a breach of warranty "in the *sale of goods*"; secondly, it must be one who "*also* regularly does or solicits business or engages in other *persistent* course of conduct, or derives substantial revenues from *goods* used or consumed or services rendered *in this State*." PLIB does not manufacture or sell *goods*, and it does not *regularly* do or solicit business in Virginia, or engage in other *persistent* course of conduct, or derive substantial revenues from goods used or consumed or services rendered *in this State*. PLIB is not a manufacturer or seller. Except for the provisions of the statute, 8.2-318 of the Code of Virginia 1950, as amended [Uniform Commercial Code] lack of privity would defeat an action against one not a party to the contract of sale. However, that section of the Uniform Commercial Code provides that lack of privity between the plaintiff and defendant is not a defense in an action brought against the "*manufacturer or seller* of goods." Section 8.2-103 of said Code defines a seller as one "who sells or contracts to sell goods." Since sub-section (a)(5) of section 8-81.2 permits jurisdiction to be obtained in an action for "breach of warranty" only when the warranty is "made in the sale of goods," and it is clear PLIB does not sell "goods," Haynes cannot bring his action within the provisions of this sub-section.

The motion to quash the service of process will therefore be granted.

Motion of Carr

Carr moves the Court to dismiss the action as to him on the grounds that plaintiff's exclusive remedy for injuries sustained, as to Carr, is under the Virginia Workmen's Compensation Act (Act).[1] It is stipulated that at the time of the accident, on October 25, 1965, Haynes was an employee of Childrey, and as such has received and continues to receive benefits under the Act.

Facts heretofore stated will not be repeated. Some additional facts may be pertinent. The trusses in question are fabricated from wooden timbers. They can be made by any reasonably capable carpenter. General contractors often construct them on the job-site. Childrey said his decision to construct them himself, with his carpenter labor, or have others construct them, is determined by how busy his own carpenters are, or the reasonableness of a sub-contractor's bid. His personnel is capable of constructing them and often does.

The Act, upon acceptance of its provisions, denies an injured employee the right to recover damages from another party if the other party is one "employed in the work" in which the employer of the injured person is engaged. Code of Virginia 1950, as amended, Section 65-20, 27, 37, 38, 39. *Bristow* v. *Safway Steel Products*, 327 F.2d 608 (4th Cir. 1964). Under the Act an injured employee has no right of action against a sub-contractor of his employer or the sub-contractor's offending servant. See Code 65-37. *Western Contracting Corp.* v. *Power Engineering Co.*, 369 F.2d 933, 935 (4th Cir. 1966).

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[1] Title 65, Code of Virginia 1950, as amended. This Title was repealed and re-enacted in 1968, effective October 1, 1968, and is now Title 65.1. The provisions of the Act are substantially the same. Since the accident occurred in October 1965, the statute prior to amendment is to be applied as to this motion.

Carr contends that it and its employees were engaged in the work undertaken by Childrey and that Carr's employees were, therefore, for the purposes of the Act employees of Childrey. Virginia Code 65-27, etc. On the other hand, Haynes says Carr was a mere supplier of materials, "If [Carr] was engaged in work which was a part of the undertaking of the . . . general contractor [Childrey], regardless of his relationship to the injured workman [Haynes] . . . the [Act] operate[s] to place the economic loss upon the project and to limit the workman's recovery to that specified in the Act." *Turnage* v. *Northern Virginia Steel Corp.*, 336 F.2d 837, 841 (4th Cir. 1964). But, where an injury is caused by the negligence of one not engaged in the overall undertaking, that is, a stranger to the business, the injured party is not limited to recovery under the Act and may bring action against the stranger. Under the Act the rights and remedies granted "shall exclude all other rights or remedies of the employee to recover for injuries incurred during the course of his employment." *Bosher* v. *Jamerson*, 207 Va. 539, 151 S.E.2d 375, 376 (1966). An employee may maintain an action at law against the person who caused the injury if he is an "other party" within the meaning of the Act. *Bosher* v. *Jamerson*, *supra*. Even though Carr may have been an independent contractor, if Carr performed work on behalf of Childrey, then Carr was not an "other party." *Bosher* v. *Jamerson*, *supra* [151 S.E.2d 377], and Haynes' right to recover is limited to the Act. *Floyd, Administratrix* v. *Mitchell*, 203 Va. 269, 274, 123 S.E.2d 369, 372 (1962).

Here, Carr was awarded a sub-contract to construct wood trusses for Childrey. He was to assemble them at the site, and place them where directed by Childrey. The work was actually carpenter work, and could have been done by Childrey. He did not do it because his carpenters were busy with other work. It required no special skill. It was part of

the trade business and occupation of Childrey. Hence, neither Carr nor Haynes was an "other party" within the meaning of the Act. Carr was obligated to construct the trusses and place them where directed by Childrey.

The case at bar falls within the principles (and facts) of *Floyd, Administratrix* v. *Mitchell,* 203 Va. 269, 123 S.E.2d 369, and *Bosher* v. *Jamerson, supra.* As said in *Floyd, Administratrix* v. *Mitchell, supra,* "The test is not whether the owner [contractor], by engaging an independent contractor to perform some part of his business, thereby engages in the business of the independent contractor. It is whether the independent contractor is performing work that is a part of the trade, business or occupation of the owner." If he is, he comes within the Act. In *Anderson* v. *Thorington Construction Company,* 201 Va. 266, 110 S.E.2d 396, 399, the court said, "[I]t clearly appears to be the purpose of section 20(a) [now 65-26 to 65-31] to bring within the operation of the Compensation Act *all persons engaged in any work* that is a part of the trade, business or occupation of the original party who undertakes as owner or contractor to perform that work." . . . But when "an employee reaches an employer in the ascending scale, of whose trade, business or occupation the work being performed by the employee is not a part, then that employer is not liable to that employee" under the Act, and then "the employee's right of action at common law is preserved." This principle was affirmed in *Rea* v. *Ford,* 198 Va. 712, 96 S.E.2d 92, where the Court held the personal representative of an employee of a principal contractor could not maintain an action for wrongful death against a sub-contractor because such contractors were not strangers to the employment and the work, and were under the canopy of the Act."

In *Rea* v. *Ford, supra,* Daniel, a general contractor, in the erection of steel trusses, rented from Ford a crane and

crew to place the trusses. In the work Rea, an employee of Daniel, was killed. In an action by Rea's administratrix against Ford, the Court held Ford was not an "other party" within the meaning of the Act. There, the Court quoted with approval from *Doane* v. *E. I. DuPont de Nemours & Co.*, 209 F.2d 924 (4th Cir.). In that case The Texas Company employed DuPont to remove certain sediment and sludge from a tank of Texas. Employees of Texas brought action against DuPont to recover injuries. The Court held that nothing in the Act indicated a workman "has a common law right of action against any contractor or workman below him in the descending line." There the Court said "the cleaning of the tank was an operation performed in the course of the business of Texas, and hence under the law of Virginia, the plaintiffs have no cause of action against DuPont." [209 F.2d 923].

In *Floyd, Administratrix* v. *Mitchell*, 203 Va. 269, 123 S.E.2d 369 (1962). Floyd, an employee of Glamorgan Pipe and Foundry Company, was struck and killed by a tractor-trailer owned by Powell and operated by Mitchell, Powell's employee. Glamorgan is a manufacturer of pipe. Floyd was foreman in the shipping yard and supervised the loading of pipe. Glamorgan contracted with Powell, a contract carrier by motor vehicle, to transport pipe to its customers. Pipe was loaded on the truck trailers by Glamorgan's cranes. While preparing to load the truck trailer, Mitchell, in backing it, struck and killed Floyd. Floyd was limited to his rights under the Workmen's Compensation Act. Glamorgan's business was manufacturing pipe. "Transporting the pipe to customers was a necessary element of this business. The loading of the pipe on the vehicles . . . was an essential part of this element of the business . . . . Glamorgan contracted with Powell to transport the pipe to . . . customers, a part of Glamorgan's business which Glamorgan could

have done with its own employees and its own equipment had it determined that to be a better way." The "fact that it engaged Powell, an independent contractor, to transport the pipe did not make Powell and Mitchell, his employee, strangers to Glamorgan's business." The test is "whether the independent contractor is performing work that is part of the trade, business or occupation of the owner." [123 S.E.2d 372].

In the case at bar, Carr was performing work which was a part of the trade, business and occupation of Childrey. Carr was doing work Childrey could have done with its own employees and with its own equipment and men had it determined that to be a better way.

See also *Anderson* v. *Thorington Construction*, 201 Va. 266, 110 S.E.2d 396; *Williams* v. *E. T. Gresham Company*, 201 Va. 457, 111 S.E.2d 498; *Beall, Admx.* v. *Standard Electric Co.*, Civil Action 4051, Memo. opinion, E.D. Va., Judge Lewis, November 28, 1967, affirmed; Case No. 12,202, December 26, 1968 (4th Cir.). The last cited case was one to recover for wrongful death because of "injuries received by an employee of a sub-contractor against an alleged third-party wrong-doer, an independent contractor performing services on the same building project." The trial court entered summary judgment holding plaintiff's remedy was limited under the Virginia Workmen's Compensation Act. The holding was affirmed in a per curiam opinion.

Carr being an independent contractor engaged in performing services which were a part of Childrey's business and occupation, the motion is sustained.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
February 20th, 1969.

APPENDIX C

OPINION OF THE COURT OF APPEALS

MAY 26, 1970

No. 13,701

BUTZNER, Circuit Judge:

This appeal raises two issues: first, whether Noy Haynes' tort action against James H. Carr Company is barred by Virginia's Workmen's Compensation Act; and second, whether the district court acquired personal jurisdiction over Pacific Lumber Inspection Bureau under Virginia's long arm statute. The district judge, applying Virginia law because jurisdiction is based on diversity of citizenship, held for Carr and the Inspection Bureau. We affirm his dismissal of the action.

I.

Haynes, a carpenter employed by Earl M. Childrey, Inc., was injured by the collapse of a roof truss on a church Childrey was constructing. Haynes received compensation for his injuries from his employer. He then brought this action against Carr, who had fabricated the truss, alleging negligence and breach of warranty. Whether Haynes has a cause of action against Carr turns on the status of Carr. If the Carr Company was solely a supplyman and a deliveryman, Haynes may sue it because it is an "other party" within the meaning of the Compensation Act [Va. Code Ann. § 65.1-41 (1968 Repl. Vol.)]. Burroughs v. Walmont, Inc., 210 Va. 98, 168 S.E.2d 107 (1969). Cf. Bristow v. Safway Steel Products, 327 F.2d 608 (4th Cir. 1964). On the other hand, Haynes' right to compensation is his only remedy, and his action against Carr is barred by other provisions of the Act [Va. Code Ann. §§ 65.1-40 and 65.1-

103 (1968 Repl. Vol.)] if Carr was performing work that was part of the trade, business, or occupation of Haynes' employer. Doane v. E. I. DuPont deNemours & Co., 209 F. 2d 921 (4th Cir. 1954); Bosher v. Jamerson, 207 Va. 539, 151 S.E.2d 375 (1966).

Consulting engineers, working in conjunction with the building's architect, prepared the designs and specifications for the trusses. The plans allowed the trusses to be fabricated either in a shop or at the job site. Childrey, the successful bidder for the job, subcontracted with Carr for the trusses. Carr elected to cut the lumber and drill holes for connecting devices at its shop. It then shipped the unassembled trusses to the job site. Its employees, under the supervision of its field superintendent, came to the job site, assembled the trusses and stacked them as directed by Childrey's superintendent. Childrey's employees later placed them in the building by the use of a crane operated by another subcontractor.

The evidence disclosed that about one-third of the general contractors in the area fabricated trusses themselves, while others subcontracted the work to specialists, such as Carr. Although Childrey had not built any trusses as large as those in question, it either fabricated trusses itself or subcontracted the work, depending on whether it had sufficient carpenters available to do the job and on the relative cost of subcontracting. The district court found that the work performed by Carr was simple carpentry work, which could have been done by Childrey's employees using tools that were readily available.

Of course, if Carr had placed the trusses in the building, there would be no doubt that it was engaged in the general contractor's work. Bosher v. Jamerson, 207 Va. 539, 151 S.E.2d 375 (1966). But the fact that Carr did not place them in the building does not prove the converse to be true

—that is, that it was not engaged in the general contractor's work. For even if Childrey had built the trusses, they would have been assembled and stacked on the job site just as Carr assembled and stacked them. These were integral steps in the construction of the building.

As the Supreme Court of Appeals, in Burroughs v. Walmont, Inc., 210 Va. 98, 99, 168 S.E.2d 107, 108 (1969), stated, "The gathering of material is of course essential to the construction of a building. So in a sense each supplier of material is engaged in the general contractor's trade, business or occupation. But a line must be drawn to determine who is an 'other party' for the purposes of the Workmen's Compensation Act." To draw this line, the district judge relied on two facts: (1) Carr, the subcontractor, was doing work embraced by the general contract at the job site, and (2) Childrey, the general contractor, could have done the work if it had elected not to engage a subcontractor. These facts form an adequate basis for the district judge's ultimate finding that Carr was performing the trade, business, or occupation of Childrey, the general contractor. Accordingly, he correctly concluded that Haynes' remedy was limited to the compensation provided by the Act and that he could not recover damages from Carr. Turnage v. Northern Virginia Steel Corp., 336 F.2d 837 (4th Cir. 1964); Rea's Adm'x v. Ford, 198 Va. 712, 96 S.E.2d 92 (1957).

Haynes relies on Garrett v. Tubular Products, Inc., 176 F. Supp. 101 (E.D. Va. 1959) and Burroughs v. Walmont, Inc., 210 Va. 98, 168 S.E.2d 107 (1969), which held that the Compensation Act afforded no shelter to third party tort feasors who were simply supplying and delivering materials. But these cases are distinguishable, for the building materials—tubular steel and sheet rock—were beyond the competency of general contractors to fabricate, and they were not partly built or assembled at the job site.

Haynes' argument that the Virginia Workmen's Compensation Act is unconstitutional is foreclosed by Northern P. Ry. v. Meese, 239 U.S. 614, 620 (1916).

II.

The plans and specifications required that all lumber used in the trusses should be either No. 1 southern yellow pine or construction grade Douglas fir graded and marked to show that it would withstand a bending stress of 1500 pounds per square inch. Some of the timber bore the stamp of the Pacific Lumber Inspection Bureau. Haynes alleged that the timber used in the trusses did not meet the specifications, that the Inspection Bureau breached expressed and implied warranties of fitness, and that it negligently inspected and graded the timber.

The Inspection Bureau has neither a place of business nor agents in Virginia, so Haynes caused process against it to be served on the Secretary of the Commonwealth of Virginia under the state's long arm statute and rule 4(c) of the Federal Rules of Civil Procedure. He asserts that the Bureau knew that the ultimate consumer of timber bearing its mark would rely on the integrity of the mark and the quality of the grade which it indicates. Consequently, he argues that the Bureau, by branding lumber which comes into Virginia, makes a representation in Virginia that the lumber bearing its brand is fit for the purposes for which it has been graded. Stated colloquially, Haynes says the Bureau's brand "speaks" in Virginia.

The Bureau operates a grading service for lumber mills in western United States. Its principal office is in Seattle, Washington, and it maintains branch offices in other western states. The district court held that the Bureau was not subject to service of process in Virginia. It reached this conclusion after finding the following facts:

> "It [the Bureau] is a non-profit service organization. It is a 'grading agency for grading lumber for anyone that is dealing in lumber products' that cares to have its grade stamp or certification. Its operation areas are Washington, Oregon, California, British Columbia, Canada and Alaska. All of its inspectors reside within the above area. It has no agents or officers in any other areas. It has no officers, agents or employees in Virginia, nor has it graded lumber in Virginia. It does not sell or ship lumber or other goods or merchandise, nor does it have any control or interest in where lumber graded by it is sold or used. It did not and does not deal with Carr. All its revenues arise from inspection charges. The charge is based upon the inspector's wages plus an overhead fee for carrying on the organization, termed as a per diem fee. It derives no revenues from any services performed in Virginia. It does no advertising and has sent no materials to Virginia. It has no contract to supply or furnish its services or anything else in Virginia, nor has it engaged in any course of conduct nor derived 'substantial revenues' for services performed in Virginia. It appears the only time it had an employee in Virginia was when, following the collapse of the trusses, it had an employee come to Virginia and make an investigation of the material used in the trusses. This investigation established that some of the timbers bore the inspection stamp of [the Bureau]."

The evidence also disclosed that the Bureau inspected, graded, and stamped the timbers outside of Virginia. A British Columbia wholesaler shipped them to the East Coast, and Carr arranged for delivery to his shop in Washington, D.C. Eventually, Carr brought them into Virginia for assembly at the job site.

Generally, the application of long arm statutes involves two steps. It is necessary to determine first whether the statute permits service of process on the non-resident defendant, and second, whether service under the statute violates the Due Process Clause of the federal constitution. This case, however, turns on the first inquiry and we do not reach the second. Virginia's long arm statute was enacted in 1964.* Except for ¶ (5), it follows verbatim the Uniform Interstate and International Procedure Act, which, in turn, borrowed from long arm statutes of Illinois, New York, and Wisconsin. See generally, Smithers, *Virginia's "Long Arm" Statute: An Argument for Constitutionality of Jurisdiction over Non-resident Individuals*, 51 Va. L. Rev. 712, 713 (1965). But

* Virginia Code Annotated § 8-81.2 (Supp. 1968) provides in part:

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

"(1) Transacting any business in this State;

"(2) Contracting to supply services or things in this State;

"(3) Causing tortious injury by an act or omission in this State;

"(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

"(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State . . .

"(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him; provided, however, nothing contained in this chapter shall limit, restrict or otherwise affect the jurisdiction of any court of this State over foreign corporations which are subject to service of process pursuant to the provisions of any other statute."

¶¶ (4) and (5) of the Virginia Act contain provisions not found in the "single act" statutes of some of the states.

The burden of proving jurisdictional facts rests upon the plaintiff. McNutt v. General Motors Acceptance Corp, 298 U.S. 178, 181 (1936). When, as here, a defendant allegedly caused injury in Virginia by an act or omission outside of the state, ¶ (4) of the Act requires the plaintiff to show the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered in this State." Also, when the plaintiff relies on a breach of warranty made in the sale of goods outside Virginia, ¶ (5) requires the plaintiff to prove the defendant had similar contacts within Virginia. But the uncontradicted evidence established that the Bureau does not solicit business in Virginia, and Haynes was unable to show that it engaged in any other persistent course of conduct there, or the amount of revenue it derived from inspecting timber ultimately used in the state. Thus, the evidence justified the district court's conclusion that Haynes failed to prove the jurisdictional facts required by ¶¶ (4) and (5).

Moreover, the jurisdictional requirements of ¶¶ (4) and (5) indicate that the legislature did not intend that the isolated introduction of defective goods into Virginia, standing alone, should confer jurisdiction under ¶¶ (1), (2) or (3) of the statute. Contrary to Haynes' theory, the legislature did not impliedly prescribe that a wrongful act, omission, or misrepresentation made outside the state should be considered a continuing wrong occurring within the state solely because improperly branded goods caused an injury in the state. If this had been intended, the legislature would have had no reason for enacting ¶¶ (4) and (5). In this respect these paragraphs restrict the reach of the Virginia

statute more than the "single act" provision of the statutes of some other states. See Etzler v. Dille & McGuire Mfg. Co., 249 F. Supp. 1, 4 (W.D. Va. 1965); Note, *The Virginia "Long Arm" Statute*, 51 Va. L. Rev. 719, 749 (1965). Consequently, cases interpreting "single act" statutes, which Haynes cites, are not applicable.

Finally, jurisdiction cannot be based on the fact that an employee of the Bureau came to Virginia to inspect the broken truss. While this may be considered the transaction of business in the state within the meaning of ¶ (1), as the district court correctly observed, the cause of action did not arise from the presence of the Bureau's employee in the state for this purpose.

To reiterate, ¶¶ (1), (2), and (3) are inapplicable under the facts of this case, and the absence of statutory contacts by the Bureau in Virginia precludes jurisdiction under ¶¶ (4) and (5). The judgment is

AFFIRMED.

APPENDIX D

PETITION FOR REHEARING

Appellant Noy Haynes, hereafter called "plaintiff," respectfully petitions the Court for rehearing of this appeal insofar as it relates to appellee James H. Carr, Inc., hereafter called "Carr," and respectfully suggests the appropriateness of a rehearing en banc because this proceeding involves a question of exceptional importance.

Plaintiff respectfully requests a rehearing on the following points of law:

I. Should the Virginia Workmen's Compensation Act be construed so as to exempt from liability to plaintiff, an actual employee of the general contractor, of Carr, a subcontractor under said general contractor?

II. If the Virginia Workmen's Compensation Act is so construed and applied as to grant immunity from suit to Carr under the circumstances of this case, is such an application a deprivation of plaintiff's property without due process of law?

* * *

[Filed June 11, 1970]

APPENDIX E

ORDER OF COURT OF APPEALS ON PETITION FOR REHEARING

Upon consideration of the petition for rehearing and of the suggestion for a rehearing en banc;

Now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

/s/ John D. Butzner, Jr.
United States Circuit Judge

Filed June 23, 1970
Samuel W. Phillips, Clerk

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Supreme Court of the United States

October Term, 1970

No. 650

NOY HAYNES,

Petitioner,

v.

JAMES H. CARR, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported in 307 F. Supp. 1228. The opinion of the Court of Appeals is reported in 427 F.2d 700. These opinions appear as Appendices B and C to the petition for a writ of certiorari filed by Noy Haynes (pp. 20-39).

QUESTION PRESENTED

When a workman employed on a construction project by the general contractor is injured due to the alleged negligence or breach of warranty by a subcontractor engaged in the work, trade and occupation of the general contractor and the workman receives compensation under insurance coverage provided by his actual employer under a workmen's compensation act, is the application of the act so as to grant immunity to the subcontractor and all other persons engaged in the work, trade and occupation of the general contractor from common law tort actions for the workman's injury such an unreasonable and capricious classification as to deprive the workman of property without due process of law in violation of either the Fifth or Fourteenth Amendments of the United States Constitution?

STATEMENT OF THE CASE

References to the Petitioner for a writ of certiorari and its appendix will be made by the letters "P." and "App." followed by the page number:

The petitioner was a carpenter in the employ of Earl M. Childrey, Inc. which was employed as a general contractor for the purpose of constructing a building for the Jahnke Road Baptist Church. The plans and specifications for the building called for the use of a number of wood trusses, the subcontract for the fabrication of which was let by Childrey to the Respondent, James H. Carr, Inc. These trusses were prepared by Carr according to the plans and specifications prepared by the architect and structural engineer. These trusses were cut and holes were drilled at Carr's fabrication plant. They were subsequently shipped to the job site and were assembled there by Carr's employees. On October 25, 1965, a number of trusses collapsed allegedly because of

negligence or breach of warranty on the part of the Respondent. As the result, the Petitioner alleges that he suffered certain injuries for which, according to stipulation (p. 11, *infra*), he received the benefits provided in accordance with the provisions of the Workmen's Compensation Act of the Commonwealth of Virginia. The adequacy of such compensation has not been questioned by the Petitioner either in the United States District Court or in the Circuit Court of Appeals for the Fourth Circuit.

The Honorable United States District Court found it to be a fact that the Respondent was a contractor engaged in the "trade, business and occupation" of the general contractor, Childrey, as the Respondent was "doing work Childrey could have done with its own employees and with its own equipment and men had it determined that to be a better way" (App. p. 31). Carr and its employees were statutory employees of Childrey and statutory fellow servants of the Petitioner. Having reached this factual determination, the Court held that the Petitioner's exclusive remedy was workmen's compensation [Code of Virginia (1950) §§ 65.1-41 and 65.1-103 (1968 Repl. Vol.) App. pp. 17, 18] and being entitled to, and having received the same, he could not institute a third-party action against the Respondent seeking a recovery for his personal injury. See *Floyd, Adm'x* v. *Mitchell*, 203 Va. 269, 274; 123 S.E.2d 369, 372 (1962) where the Virginia Supreme Court of Appeals said:

> The test is not whether the owner (contractor) by engaging an independent contractor to perform some part of his business, thereby engages in the business of the independent contractor. It is whether the independent contractor is performing work that is part of the trade, business or occupation of the owner.

Also, in *Anderson* v. *Thorington Const. Co., Inc.*, 201 Va. 66; S.E.2d 514 (1959), app. dis. 363 U.S. 719 (1960) Anderson who was an engineer in the employ of Parsons, Brinkerhoff, Hall and McDonald, consulting engineers for the Richmond-Petersburg Turnpike Authority, was held to have no right to maintain a third-party action against Thorington which was doing a portion of the construction work for the Authority on the grounds that both Thorington and Anderson's employer were engaged in the work of the Authority in the construction of the turnpike and as such were fellow employees within the purview of Code of Virginia (1950) § 65-38, as amended, now § 65.1-41 (App. p. 17). As the Petitioner has pointed out, this case was before this court but it was dismissed "for want of a properly presented substantial federal question" (P. p. 12).

While the whole thrust of the Petitioner's argument both in the District Court and in the Court of Appeals has been elsewhere, he has contended that to deny him the right to maintain a third-party action against the Respondent was a denial of due process of law. Both Courts, however, have summarily rejected his position and have upheld the constitutionality of the Virginia Workmen's Compensation Act and its denial to the Petitioner and all other persons engaged in the trade, business and occupation of his employer the right of third-party actions against those similarly engaged.

ARGUMENT

Each state, by virtue of its inherent police power, has authority under the Constitution to alter the traditional common law rules for the purpose of implementing its legislative policy in the field of workmen's compensation. In *New York Cent. R. Co.* v. *White*, 243 U.S. 188 (1917), this court upheld the constitutionality of the New York Workmen's Compensation Act where the railroad contended that

its application deprived it of its property without due process of law. This court pointed out at 198 that "[n]o person has a vested right in any rule of law entitling him to insist that it shall remain unchanged for his benefit." The common law doctrine of negligence with its defenses of contributory negligence, assumption of risk and fellow servant negligence were said to be "inapplicable to modern employment." See 243 U.S. at 197. In all cases a statute should be construed so as to support rather than to defeat its constitutionality. See *Crowell* v. *Benson*, 285 U.S. 22 (1932).

The General Assembly of Virginia in its wisdom has enacted laws of workmen's compensation designed to see that the loss occasioned by the injury or the death of the employee is borne by the industry in which he is employed rather than by the individual wrongdoer. See *Doane* v. *E. I. duPont deNemours & Co.*, 209 F.2d 921 (4th Cir., 1951) and *Feitig* v. *Chalkley*, 185 Va. 96; 38 S.E.2d 73 (1946). The factual determination in this case establishes irrevocably that the Respondent was engaged in the "trade, business and occupation" of the general contractor and as such was a fellow employee of the Petitioner. It is the contention of the Petitioner that loss for his injuries should fall upon the Respondent who is alleged to be the wrongdoer. If such is the case, then where injuries to an employee may result from negligence on the part of a fellow employee both of whom are in the employ of a general contractor, then such loss should fall upon the fellow employee.

The Petitioner suggests that because there is no *quid pro quo* between the Petitioner and the Respondent he is being denied his property without due process of law by not being allowed to institute a third-party action against the Respondent. By the same token, an employee may be injured by the negligence of a fellow employee directly employed by the same employer and certainly no *quid pro quo* exists

between the two fellow employees. In quoting from Professor Larson (P. p. 13), the Petitioner suggests that the reason for allowing "third-party actions is the moral idea that the ultimate loss from wrongdoing should fall upon the wrongdoer." While this idea seems to be losing popularity generally, if it is true and demanded by the Fifth or Fourteenth Amendments of the Constitution, then all workmen's compesation laws should be declared unconstitutional and we should return to the common law where the loss falls upon the wrongdoer *even* if the wrongdoer is the injured party.

Counsel for the Petitioner suggests that immunity should not be allowed in this case particularly because the Court has drawn such a subtle distinction between a mere supplier of materials and a subcontractor. In all cases there must be a factual determination and in the present case, the factual question has been resolved in favor of the Respondent. Whether Respondent was a fellow employee of Petitioner is no longer an issue before this Court. It is suggested that granting immunity from suit to the Respondent may be a windfall to the negligent party if in fact the Respondent was negligent. On the other hand, when the employee is the negligent party and receives compensation, then there must be considered a windfall in his favor. That was the railroad's complaint in *New York Cent. R. Co.* v. *White*, *supra*, and this Court held that workmen's compensation was a reasonable exercise of the police power and not violative of the requirements of due process. It was the railroad's contention that the employee's own drunkenness caused his death and to require it to pay compensation simply because he was on the job at the time was a denial of its property without due process of law. This Court, however, stated that in order for such an act to be considered in contravention of the requirements of due process, the application of it must be "arbitrary and unreasonable." 243 U.S. at 205.

Petitioner relies in great measure on *Grasse* v. *Dealers Transport Co.*, 106 N.E.2d 179, 412 Ill. 179 (1952). In that case a truck driver and his employer's efforts to sue the employer of an adverse driver were thwarted by a provision of the Illinois Workmen's Compensation Act which provided that where an employee had received compensation and the third party tort-feasor was bound by the Act, only the employer had the right to sue the tort-feasor and only to the extent of the payment of compensation to its employee. Such a statute had the effect of limiting the employee's recovery to compensation in an accident where the third party was covered by the Act even where the third party had no relationship of any kind to the work, trade and business of the employer. The inconsistency arose because it allowed full recovery against one who had no relationship to the employee's business but happened not to be covered under the Act. This resulted in a classification which was, according to the Court, a denial of equal protection in that an employee involved in an automobile accident who received compensation would be barred from instituting an action for his injuries against a person employed in a business covered by the Act but would not be barred from instituting an action against a housewife driving the family automobile, even though she may have had no more relation to his employee's business than the driver of the adverse vehicle in the *Grasse* case. Admittedly, the Illinois Court does state that the application of the Act in the case is also violative of due process but points out that the constituional guarantees of due process and equal protection overlap one another and equal protection extends beyond the requirements of due process of law. See also *Truax* v. *Corrigan*, 257 U.S. 312 (1921).

The Court here is not faced with an arbitrary classification and although *Northern Pac. Ry.* v. *Meese*, 239 U.S.

614 (1916) held that the workmen's compensation act there in question was not in conflict with the requirements of the equal protection clause, the reasoning contained therein is just as applicable to the question as to whether it is also violative of the due process.

The application of this act is consistent in that it allows employees to institute suits against third persons who are strangers to the trade, business and occupation of the employer but grants immunity from suit to those conducting his business [Code of Virginia (1950) §§ 65.1-41 and 65.1-103 (1968 Repl. Vol.)]. All persons, including the employees of the Respondent who were engaged in the trade, business and occupation of the general contractor, Childrey, were entitled to claim compensation from Childrey if compensation was not otherwise provided by their immediate employers. The fact that the Petitioner as an employee of Childrey could not collect workmen's compensation from Carr is of no moment. Workmen's compensation statutes were established in order that the injured workman, regardless of who was at fault, would not have to bear the burden of the injury sustained in an industrial accident for in most cases his limited income would not be sufficient to sustain him during his period of recuperation and he and those dependent upon him might be overcome by poverty and would become a burden upon public or private charity. See *New York Cent. Ry. Co.* v. *White*, *supra* at 197. Workmen's compensation laws were designed to protect the worker and his dependents and even in a case where a brother and sister of a longshoreman were denied compensation under the Longshoremen's Act because they were not his dependents, a denial of their right to institute a wrongful death action under which they were potential beneficiaries, did not amount to a denial of their property without due process of law. The compensation laws provided the necessary protec-

tion to the deceased employee and abrogation of what would be his siblings' rights under a wrongful death act was not unreasonable or capricious and was within the police power of the state. See *Rhinehart* v. *Smith & Son,* 14 So.2d 287 (La.App., 1943).

The statutory framework constituting the Virginia Workmen's Compensation Act, which seeks to see that losses occasioned as a result of an individual injury are borne by the industry itself rather than by the wrongdoer, meets the constitutional requirements of due process for it is not an unreasonable and arbitrary classification. Those engaged in the trade, business and occupation of a general contractor, are entitled to compensation under the Act and are immune from suit by their fellow employees whether the employees are direct employees of the general contractor or statutory employees under the interpretation of the Act by the Virginia Court. Those parties who are not engaged in the trade, business and occupation of the employer are amenable to suit by the injured employee. See *Garrett* v. *Tubular Products, Inc.,* 176 F.Supp. 101 (E.D. Va., 1959). The Respondent has been held to be engaged in the trade, business or occupation of the general contractor, Earl M. Childrey, Inc., and if the Petitioner is permitted to institute a third-party action against the Respondent, then any employee should be allowed to institute a third-party action against any other fellow employee responsible for his injury even one directly employed by his immediate employer. If such is allowed, the entire reasoning behind the enactment of workmen's compensation laws—that is that the loss for industrial injury to an employee should fall upon the industry which employs him—fails. In most instances, the employer acts only through its agents and if workmen's compensation can provide immunity only for the employer itself then the whole purpose of the Act is thwarted and the loss will fall not upon the industry but upon the individual employee causing the in-

jury, whether that employee be a direct fellow servant of the injured employee or a subcontractor engaged in the trade, business and occupation of the general contractor.

CONCLUSION

It is clear that the Virginia Workmen's Compensation Act establishes no unreasonable or arbitrary standard in denying those who are entitled to compensation the right to bring third-party actions against those engaged in the trade, business and occupation of their employers. An employee injured has no vested right of action against the third party and the granting of immunity to those engaged in the trade, business and occupation of his employer does not amount to a denial of the employee's property without the due process of law.

Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of this brief in opposition were mailed postage prepaid, to George E. Allen, Esquire, and James A. Eichner, Esquire, 1809 Staples Mill Road, Richmond, Virginia 23230, counsel for petitioner, on or before October 2, 1970.

RICHARD L. WILLIAMS

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA,

RICHMOND DIVISION

STIPULATION

It is hereby stipulated and agreed to by all parties hereto, by counsel, that at the time of his injury on October 25, 1965, the complainant, Noy Haynes, was an employee of Earl M. Childrey, Inc., and as such has received and continues to receive benefits under the Virginia Workmen's Compensation Act.